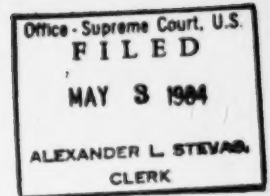


SUPREME COURT OF THE UNITED STATES



JIMMY LEE SMITH,

Petitioner,

vs.

CASE NO. 83-6549

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL

JOHN W. TIEDEMANN
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER THE SUPREME COURT OF FLORIDA'S USE OF ITS
KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981) TEST
FOR EVALUATING THE CONSTITUTIONAL ADEQUACY OF
PETITIONER'S TRIAL COUNSEL, IN LIEU OF USING THE
TEST OF WASHINGTON V. STRICKLAND, 693 F.2d 1243
(5th Cir. 1982), cert. granted, U.S. ,
77 L.Ed.2d 1332 (1983), PRESENTS A FEDERAL QUESTION
SUFFICIENT TO INVOKE THIS COURT'S DISCRETIONARY
JURISDICTION IN VIEW OF THE ALLEGEDLY MEANINGFUL
CONFLICT BETWEEN THESE TWO TESTS?

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2

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624 F.2d 196 (D.C.Cir. 1979)

2

Washington v. Strickland,
693 F.2d 1243 (5th Cir. 1982),
cert. granted, U.S. —,
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Amendment V, U.S. Constitution

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Amendment XIV, U.S. Constitution

1

Stern & Gressman, Supreme Court Practice,
(5th Ed. 1978), pp. 254-317

3

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citations to the Opinions Below.

Respondent accepts the first paragraph of Petitioner's Jurisdictional Grounds, but rejects the remainder as conclusory.

Respondent accepts Petitioner's Constitutional and Statutory Provisions, but would note that although the cited Amendment VI of the Constitution of the United States provides that "the accused shall enjoy the right to . . . have the assistance of counsel for his defense", Petitioner indisputably enjoyed the assistance of counsel; the issue is actually more whether counsel's performance was constitutionally adequate under the due process clause of Amendment V as made applicable to the States by Amendment XIV.

STATEMENT OF THE CASE AND FACTS .

Respondent rejects Petitioner's Statement of the Case as argumentative and substitutes in its stead the opinions of the Florida Supreme Court in Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) and Smith v. State, 445 So.2d 323 (Fla. 1983), the latter being the opinion over which Petitioner seeks review. For the perusal of the Court, Respondent attaches as its Appendix A a copy of the trial court order which this opinion affirmed.

ARGUMENT

WHETHER THE SUPREME COURT OF FLORIDA'S USE OF ITS KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981) TEST FOR EVALUATING THE CONSTITUTIONAL ADEQUACY OF PETITIONER'S TRIAL COUNSEL, IN LIEU OF USING THE TEST OF WASHINGTON V. STRICKLAND, 693 F.2d 1243 (5th Cir. 1982), cert. granted, ___ U.S. ___, 77 L.Ed.2d 1332 (1983), PRESENTS A FEDERAL QUESTION SUFFICIENT TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION IN VIEW OF THE ALLEGEDLY MEANINGFUL CONFLICT BETWEEN THE THESE TWO TESTS?

Petitioner alleges that the Florida Supreme Court's employment of its Knight v. State, 394 So.2d 997 (Fla. 1981), see also United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) "outcome determinative" test for evaluating the constitutional adequacy of his trial counsel, in lieu of employing the Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), cert. granted, ___ U.S. ___, 77 L.Ed.2d 1332 (1983), "reasonably likely to render effective assistance" test, presents a federal question sufficient to invoke this Court's discretionary jurisdiction in view of the allegedly meaningful conflict between these two tests. Respondent disagrees that this Court's intervention is warranted, for several reasons. Initially and fundamentally, Respondent would note that Petitioner does not and could not fairly allege that the result of the proceeding below would have been different had the Florida Supreme Court employed the Washington v. Strickland test in lieu of the Knight v. State test. Petitioner could reap no benefit even if this Court were to adopt the Washington v. Strickland standard; hence, assumption of review over the decision below would be contrary to this Court's practice of declining to issue advisory opinions. See DeFunis v. Odegaard, 416 U.S. 312 (1974). Assumption of review over the decision below would moreover be contrary to the axiom that federal relief generally cannot be predicated upon an alleged violation of state post-conviction relief procedures, see e.g., United States ex rel. Wiggins v. Commonwealth of Pennsylvania, 302 F.Supp. 845 (E.D.Pa. 1969), affirmed, 430 F.2d 650 (3rd Cir. 1970). Petitioner will surely begin climbing the federal ladder in the usual sequence upon denial of the instant petition.

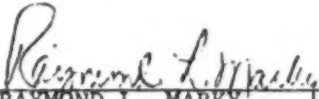
In reality, Petitioner, in the understandable but vain hope of upsetting the death sentence he once requested, is merely seeking review to determine whether the Florida Supreme Court correctly decided that he did not plead facts sufficient to warrant an evidentiary hearing on the constitutional adequacy of his trial counsel. Rule 17 of the Rules of this Court and Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) make it clear that such review is not the function of the Writ of Certiorari. See also Stern & Gressman, Supreme Court Practice (5th Ed. 1978), pp. 254-317.

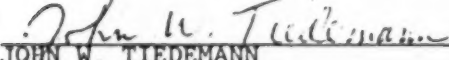
CONCLUSION

Petitioner has failed to demonstrate that any substantial federal question exists which merits the exercise of this Court's discretionary review. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General


RAYMOND L. MARKY
Assistant Attorney General


JOHN W. TIEDEMANN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Augustus Harper, Jr., Counsel for Petitioner, Post Office Box 10132, Tallahassee, Florida, 32302, on this 1st day of May, 1984.

Raymond L. Marky
RAYMOND L. MARKY
Assistant Attorney General

John W. Tiedemann
JOHN W. TIEDEMANN
Assistant Attorney General

APPENDIX A

STATE OF FLORIDA,

Plaintiff,

-vs-

JIMMY LEE SMITH,

Defendant.

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
FOR THE STATE OF FLORIDA

CASE NOS. 5-78-200 and 5-78-201
IN AND FOR JACKSON COUNTY, FLORIDA

ORDER

Upon consideration of Defendant's Motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and after hearing the arguments of counsel:

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Post-Conviction Relief is DENIED for the reasons set forth orally at the hearing on the aforesaid motions;

Specifically, the Court notes that the defendant expressed complete satisfaction with the performance of his trial counsel, to wit:

"Mr. Laramore, he's been beside me, like you say, for three or four months, and he's helped me and done everything he can." (Page 655 of the record.)

IT IS FURTHER ORDERED AND ADJUDGED that Defendant be declared indigent for the purpose of appeal and all costs allowed by law incident to such appeal including, but not limited to, all transcripts necessary to fully prosecute said appeal shall be paid by Jackson County, Florida.

DONE AND ORDERED this 9th day of March, 1983.

Robert L. McCarty
CIRCUIT JUDGE

CERTIFIED A TRUE COPY.

DAUN CREWS
CLERK CIRCUIT COURT
JACKSON COUNTY, FLORIDA

By *Robert L. McCarty* D.C.

